MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR., *Petitioner,*

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL IN OPPOSITION

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The Tri-State Local and the Lily of the Valley Local of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC Locals),[1] among the respondents in the

[1] The two local lodges were consolidated on December 8, 1971.

above-entitled case, submit this brief to the Court in opposition to the petition for certiorari to the Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

A. The United States District Court for the Western District of Tennessee, Western Division, entered three orders as follows:

1. An order dated June 14, 1971, which (a) granted the motion of the BRAC Locals for summary judgment on petitioner's discrimination claims against the BRAC Locals; (b) granted the motions of the BRAC Locals and REA Express to dismiss petitioner's claims under Title 42, Section 1981 of the United States Code; (c) granted in part and denied in part the motion of REA Express for summary judgment on petitioner's discrimination claims; (d) denied the motions of the BRAC Locals to dismiss petitioner's Title VII claims on the ground that the action was not brought within thirty days after the Federal Equal Employment Opportunity Commission notified petitioner of his right to sue as the statute then required. This order is not officially reported and is reproduced at pages 1a-3a in the Appendix to the petition.

2. An order dated February 15, 1972 (entered February 16, 1972), dismissing the action without prejudice. This order is not officially reported and is reproduced at pages 4a-5a of the Appendix to the petition.

3. An order dated January 25, 1973, granting the motions of the BRAC Locals and REA Express to dismiss a second complaint, with identical claims to those in the first complaint, filed on May 31, 1972. This order is not officially reported and is reproduced at pages 6a-12a of the Appendix to the petition.

B. The Court of Appeals issued its opinion and judgment affirming the action of the District Court on November 27, 1973, which is reported at 489 F.2d 525 and reproduced at pages 13a-21a of the Appendix to the petition.

The Court of Appeals entered its order denying a petition for rehearing on January 15, 1974, reported at 489 F.2d 530 and reproduced at pages 22a-26a of the Appendix to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

In the opinion of the respondent BRAC Locals, this petition presents the issue as to them only whether the District Court erred in dismissing on the basis of *res judicata* a complaint filed on May 31, 1972, against these respondents containing the identical allegations of racial discrimination set forth in an earlier complaint by the same petitioner of March 18, 1971, in the same Court, asking for injunctive and monetary relief, with respect to which the BRAC Locals were granted summary judgment on the merits on June 14, 1971, and no appeal was taken by petitioner either from that order or a subsequent order of February 16, 1972, dismissing the remaining issues against the other respondent REA Express.

STATUTES AND FEDERAL RULES INVOLVED

In addition to the statutory provisions quoted at pages 3-5 of the petition, there is involved the provisions of Title 28, Section 1292(a)(1) of the United States Code and Rule 54(b) of the Federal Rules of Civil Procedure. These provisions are quoted in the Appendix hereto.

STATEMENT

Petitioner is a Negro citizen of the United States and a resident of the State of Tennessee. He was an employee of REA Express from the spring of 1964 until June 20, 1967, when his employment was terminated by the carrier. While an employee of REA Express, he was a member of respondent Lily of the Valley Local (Petitioner's App. 1a-3a),[2] a subordinate unit of BRAC, the duly authorized representative under the Railway Labor Act of most of the employees of REA Express since 1929.[3] In 1952, BRAC and REA Express amended their collective bargaining agreement to fully integrate the seniority rights of REA employees regardless of race. A group of white employees brought suit to invalidate the integration agreement. This complaint was dismissed by the Federal District Court in Jacksonville, Florida, and such decision was affirmed by the United States Court of Appeals for the Fifth Circuit. These decisions set forth the facts with respect to the BRAC representation of black and white employees of REA Express and the integration of the seniority rosters. *Pellicer* v. *Brotherhood of Railway and Steamship Clerks,* 118 F.Supp. 254 (D.C. S.D., Fla., 1953), aff'd 217 F.2d 205 (5th Cir., 1954), *cert. den.* 349 U.S. 912.[4]

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[2] Appellant's Appendix in Court of Appeals.

[3] BRAC Locals have a limited function of progressing grievances at a local level. They do not make agreements.

[4] BRAC recently successfully defended a Title VII action brought against BRAC and REA Express by white employees at the Birmingham, Alabama, facility of the carrier based on the 1952 integration. *Barbour* v. *REA Express, et al.* (Civil Action No. 72-235, D.C. N.D. Ala., S.D.). On October 17, 1973, the District Court, after a trial on the merits, upheld the integration under Title VII.

It was under this seniority system that petitioner Johnson became an employee of REA Express in 1964. He was able to bid for any job within his seniority district for which he was qualified and did obtain a bulletined or permanent job as a driver of REA Express vehicles in the Memphis area. He was holding this job when his employment was terminated by REA Express on or about June 20, 1967. Petitioner never at any time filed a grievance with BRAC Lily of the Valley Local alleging any violation of his rights by his employer REA Express (Petitioner's App. 83a-92a).

On March 18, 1971, petitioner filed his first complaint in the District Court against REA Express and the BRAC Locals alleging that REA Express had terminated his employment for reasons of race; that the carrier had denied him the opportunity to obtain supervisory training and promotion given to white employees; and that the carrier assigned, re-assigned, and promoted employees so as to maintain a pattern of racial discrimination. The complaint against the BRAC Locals was that the plaintiff had been denied membership in the BRAC Tri-State Local; that the BRAC Locals failed to defend the rights of black members in the same manner as they defended the rights of white employees; and that the BRAC Locals participated in the alleged discrimination in the assignment, re-assignment, and promotion of black employees of REA Express (Petitioner's App. 48a-54a).

BRAC filed a motion on April 30, 1971, to dismiss the complaint or, in the alternative, for summary judgment on legal grounds. The alternative motion for summary judgment was amended when petitioner's answers to interrogatories showed that the allegations

in the complaint as to the BRAC Locals were mere conclusions not supported by any facts. REA filed a similar motion. The same motions were filed in a companion case (Civil Action No. C-71-2) brought by a Mr. Thomas Thornton, who was also a black employee of REA Express (App. to Petition 1a).

Court-appointed counsel for petitioner appeared before the District Court to oppose the motions in the two separate cases and fully argued the position of the plaintiffs (Petitioner's App. 97a). The order of the District Court dated June 14, 1971, granted the BRAC Locals summary judgment in both cases with respect to the claims of discrimination and also dismissed the Section 1981 action under the Tennessee statutes of limitations. REA was left as a defendant in the two cases as to some of the discrimination claims. Neither petitioner nor Mr. Thornton appealed this order.

Thereafter, the two cases were set for trial against REA on February 2, 1972. The attorney for the two plaintiffs obtained an offer of settlement from REA Express which was accepted by Mr. Thornton and rejected by petitioner. The attorney for petitioner filed a motion with the District Court on January 7, 1972, to be relieved of the representation, stating that in view of the staleness of petitioner's claims and for other reasons he had strongly recommended the settlement. The motion was granted on January 14, 1972, and on that date, at the direction of the Court, the Clerk wrote to petitioner advising him that he had 30 days from January 14, 1972, to obtain counsel or the case would be dismissed without prejudice. Petitioner neither obtained other counsel within the time limit or requested an extension of time. The District Court, therefore, on

February 16, 1972, dismissed the action (App. to Petition, 4a, 5a).

On February 17, 1972, attorney William E. Caldwell wrote to the District Court requesting that the 30-day period be extended an additional 30 days (Petitioner's App. 35a). The request was denied because the action already stood dismissed (Petitioner's App. 39a).

On May 31, 1972, petitioner filed a second complaint against REA Express and the BRAC Locals substantially identical to the original complaint (Petitioner's App. 1a). This complaint was dismissed as to the BRAC Locals on grounds of *res judicata*. The District Court also found that the second complaint was not timely filed under Title VII of the Civil Rights Act and was barred as was the original complaint with respect to the invocation of Sections 1981, 1982, and 1983 of Title 42 of the United States Code, by the applicable Tennessee statutes of limitations (App. to Petition, 6a-12a). The Court of Appeals affirmed the dismissal of the second complaint (App. to Petition, 13a-21a) and denied a petition for rehearing (App. to Petition, 22a-26a).

ARGUMENT

This case is presented in a factual and legal framework which makes it entirely inappropriate for review by this Court. It involves a situation in which the respondent BRAC Locals were granted judgment on the merits of petitioner's claims of racial discrimination by the District Court; the petitioner did not at any time appeal this judgment as to the BRAC Locals although he could have done so; the remaining portion of the action was subsequently dismissed as to the other

respondent, and no appeal was taken from such order; and finally the same complaint was filed a second time in the same District Court against the BRAC Locals some 11½ months after these respondents were granted judgment on the merits of the same claims and some 3½ months after the District Court wiped out the remnants of the action against the other respondent. The District Court correctly dismissed the second complaint against the BRAC Locals and the Court of Appeals correctly affirmed such judgment. Any other result would, as the Court of Appeals observed, destroy orderly litigation, inordinately delay the processing of claims, and be unfair to respondents. No substantial Federal question is presented for review by this Court.

I.

The Decisions Below Are Clearly Correct and Raise No Substantial Federal Question

Petitioner argues that the decision of the District Court affirmed by the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Otherwise, petitioner asserts, the values of the Civil Rights Acts will be frustrated by technical rules, woodenly applied, to the benefit of large corporations and powerful unions.[5] To the

[5] The powerful union of which the petitioner speaks is a local lodge of employees of REA Express in Memphis, Tennessee, with approximately 108 employed members limited to processing of local grievances, and whose principal officer receives a salary of less than $25.00 a month. The organization with which petitioners' principal attorneys are associated is several times larger and more powerful than the union respondents. The large corporation is an express carrier whose operations in the last 30 years have shrunk to such an extent that the number of its regular employees has

contrary, the decisions of the lower Courts are clearly correct.

Petitioner's argument that he has been denied a hearing on his claims is simply not true. These respondents submitted written interrogatories to the petitioner with respect to these claims pursuant to Rule 33 of the Federal Rules of Civil Procedure (Petitioner's App. 83a). When the answers to these interrogatories revealed that the claims were without substance, the respondent unions moved for judgment on the merits, an extensive hearing was conducted before Chief Judge Brown of the District Court at which petitioner was fully represented by counsel, and on June 14, 1971, the District Court granted judgment to the BRAC Locals on these claims. Partial judgment was granted to respondent REA (Petitioner's App. 46a, 90a, 94a, 97a). No appeal was taken from this order. Subsequently, on February 16, 1972, the District Court dismissed the remainder of the action against REA (Petitioner's App. 106a). No appeal was then taken. Instead, three and one-half months later petitioner filed a second complaint with the identical claims against the BRAC Locals with respect to which those respondents had been granted judgment on the merits nearly a year earlier. The District Court held that such claims were barred by the doctrine of *res judicata* (App. to Petition, 6a). The Court of Appeals affirmed. On this point, the District Court stated (App. to Petition, 9a):

> "This action clearly involves the same parties and the same subject matter of dispute as were

decreased approximately 90% and which on August 6, 1974, will lose some 40% of its revenue pursuant to recent orders of the Civil Aeronautics Board ending the REA-airlines air express contract on that date.

> before Judge Brown. Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim after a final disposition by Judge Brown. *Sopp* v. *Gehrlin,* 236 F.Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree,* 326 F.Supp. 755 (E.D. Pa. 1971), *Vassos* v. *Societa Trans-Oceania,* 272 F.2d 182 (2nd Cir. 1960), *cert. denied, Haldane* v. *Wilhelmina Helen King Chagnon,* 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a 'second bite at the apple' after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction."

The Court of Appeals agreed as follows (App. to Petition, 23a footnote 1):

> "The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned."

These holdings are clearly correct.

Petitioner's argument that the District Court's order of June 14, 1971, was neither final nor appealable under Rule 54(b) of the Federal Rules of Civil Procedure is wholly without merit. The decisions are unanimous to the effect that Rule 54(b) is not applicable to orders

appealable under 28 U.S.C.A., Section 1292. *Atlantic Richfield Co.* v. *Oil, Chemical and Atomic Workers International Union,* 447 F.2d 945 (7th Cir., 1971); *Rains* v. *Cascade Industries, Inc.,* 402 F.2d 241 (3rd Cir., 1968); and cases cited therein. The order was clearly appealable under Section 1292(a)(1) because it granted judgment on a complaint which is described in paragraph I thereof as "a suit in equity" and which in paragraph XII sought preliminary and permanent injunctive relief and incidental damages by way of back pay. *Rains* v. *Cascade Industries, Inc.,* 402 F.2d 241 (3rd Cir., 1968).

Moreover, even if Rule 54(b) applied to the District Court's order of June 14, 1971, the Court's order of February 16, 1972, dismissing the remainder of the action, made the earlier order final and appealable. The petitioner's argument that this is not so because the latter order was without prejudice is equally without merit. *United States* v. *Wallace & Tiernan,* 336 U.S. 793; *Allied Air Freight* v. *Pan American World Airways,* 393 F.2d 441 (2nd Cir., 1968), *cert. den.* 393 U.S. 846. In the *Wallace & Tiernan* case, page 795, this Court rejected petitioner's argument.

The suggestion that petitioner should be allowed to relitigate the same claims against respondent unions because of alleged inadequate representation is also without merit. As the District Court pointed out (App. to Petition, 9a), the contention cannot affect the finality of the unappealed order. Moreover, petitioner was adequately represented. Petitioner's attorney did appear and did vigorously oppose the motions of respondents. Indeed, he was successful with respect to the basic issue of whether the complaint had been timely

filed and, except for one claim, with respect to the motion of REA for summary judgment (App. to Petition, 1a-5a).[6] The complaint bears ample witness to his competency (Petitioner's App. 48a). Present counsel copied it in filing the second complaint. The fact no appeal was filed from the order of June 14, 1971, was clearly based on his judgment as to the lack of merit in petitioner's claims against respondent unions as shown by his later request to withdraw. On and after February 17, 1972, while appeal time was running on the order of February 16, 1972, petitioner's present counsel were aware of that fact and were acting for petitioner while they debated whether the case had sufficient merit to warrant further expenditures of time and money. (Petitioner's App. 35a, 37a).

The remaining contentions of petitioner with respect to the decisions below on jurisdictional aspects of the second complaint under Title VII and the treatment accorded his invocation of Title 42, Section 1981 of the United States Code, as an alternative basis for jurisdiction, are irrelevant insofar as the petition seeks to review the judgment below as to respondent BRAC Locals. As the Court of Appeals found (App. to Petition, 23a), "the unions have a complete defense on the ground of res judicata". Moreover, for the reasons stated in the Court of Appeals decision and the denial of the petition for rehearing those aspects of the decisions below are correct and present no substantial Federal question. Likewise, petitioner's effort (Pet. 13) to create a conflict between the Court of Appeals and decisions of the Fifth Circuit in the *Boudreaux* case

[6] The District Court's decision in favor of petitioner on these issues clearly shows that the Court was not woodenly applying procedural requirements to petitioner.

and in the District of Columbia in the *Spector* case with respect to the tolling issue must fail since the petitioner is citing *dicta* in footnotes in the latter cases not applicable to the issues before those Courts. Finally, such alleged conflict does not relate to the decisions below as to the BRAC Locals since the dismissal of the second complaint against these respondents on grounds of *res judicata* applied to both Title VII and Section 1981.[7]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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[7] The petitioner agrees that the dismissal of the second complaint as to the BRAC Locals on grounds of *res judicata* is applicable to both Title VII and Section 1981 (Pet. 12). This must necessarily be true as the claims of discrimination are the same under both statutes.

APPENDIX

Title 28, Section 1292(a)(1) of the United States Code

"*§ 1292. Interlocutory decisions*

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

Rule 54(b) of the Federal Rules of Civil Procedure

"*Rule 54. Judgments; Costs*

"(a) * * * *

"(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims."